

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DAVID MARQUETTE GREEN,

Petitioner,

v.

ACTION NO. 2:23cv405

HAROLD W. CLARKE,
Director of the Virginia
Department of Corrections,

Respondent.

FINAL ORDER

Petitioner David Marquette Green ("Green"), a Virginia inmate proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254¹ on August 16, 2023. ECF No. 1. Green challenges his conviction in the Circuit Court for Lancaster County in November 2022, for possession of a weapon by a violent felon. *Id.* at 1-2. The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation.

¹ Green mistakenly used the form for a petition pursuant to 28 U.S.C. § 2241. See ECF No. 1. Green is a state prisoner challenging his conviction and sentence in state court. Accordingly, his petition is treated as one brought pursuant to 28 U.S.C. § 2254.

On September 13, 2023, the Court entered an order directing Green to show cause why his petition should not be dismissed pursuant to 28 U.S.C. § 2254(b)(1)(A) without prejudice to Green refiling his claim in this Court after proceeding in state court and signing his petition. ECF No. 4. The Court warned Green that if he failed to comply with the order within 30 days, the matter would be submitted to a United States District Judge for dismissal without prejudice. *Id.* Green failed to respond to the order and the time to respond has expired.

The report and recommendation, filed November 9, 2023, recommends that Green's federal petition be dismissed without prejudice to Green's refiling his federal petition after he has proceeded in the Virginia state courts and signed the petition. ECF No. 5, at 1. Each party was advised of the right to file written objections to the findings and recommendations made by the Magistrate Judge. *Id.* at 2-3. No objection has been filed.


The Court, having reviewed the record, does hereby adopt and approve the findings and recommendations set forth in the report and recommendation. The Court, therefore, **ORDERS** that Green's amended petition is **DISMISSED WITHOUT PREJUDICE** to allow Green to proceed with his claims in state court and sign the petition.

Green has failed to demonstrate "a substantial showing of the denial of a constitutional right," and, therefore, the Court declines to issue any certificate of appealability pursuant to

Rule 22(b) of the Federal Rules of Appellate Procedure. See *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

Green is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. R. App. P. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). **If Green intends to seek a certificate of appealability from the Fourth Circuit, he must do so within thirty (30) days from the date of this Final Order. Green may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.**

The Clerk shall mail a copy of this final order to Green and counsel of record for respondent.



/s/
Rebecca Beach Smith
Senior United States District Judge

Rebecca Beach Smith
Senior United States District Judge

Norfolk, Virginia
December 12, 2023